THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF CAMPAIGN & POLITICAL FINANCE
ONE ASHBURTON PLACE ROOM 411
BOSTON MASSACHUSETTS 02108

MICHAEL J. SULLIVAN
DIRECTOR

TEL: (617) 727-8352
(800) 462-OCPF
FAX: (617) 727-6549

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INTERPRETIVE BULLETIN

Express Advocacy and Issue Advocacy

This office is frequently asked for guidance regarding the applicability of the Massachusetts campaign finance law, M.G.L. c. 55, to various types of advertisements or other communications that might be viewed as "issue oriented," but which might also be seen as praising or disparaging a candidate. For example, an advertisement might be aired or published prior to an election that clearly identifies a candidate, describes the public policy issues that the group paying for the ad believes the candidate has mishandled or is mistaken on, and urges persons to call the candidate. The ad does not, however, ask voters to vote for the candidate's opponent or against the candidate. Similarly, an ad might praise a candidate's position on an issue, but stop short of asking for a vote in favor of the candidate.

This Bulletin provides guidance regarding whether such communications involve the making of expenditures subject to the requirements of the Massachusetts campaign finance law.

I. Summary

In general, a communication is regulated under the Massachusetts campaign finance law if it contains "express advocacy," as opposed to "issue advocacy." A communication contains "express advocacy" regarding a clearly identified candidate if it contains one of the following: (1) explicit words that urge the nomination, election or defeat of the candidate, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Senate," "vote against," "defeat," or "reject" or synonymous words, such as "unseat"; (2) words that urge other electoral action, such as words asking viewers or readers to campaign for or contribute to, the candidate; (3) words, symbols or graphic representations that relate to the candidate's nomination or election (e.g., "vote," "election," or "candidate"), if in the context of the entire communication, the words exhort the reader/viewer/listener to take action to support the nomination, election or defeat of the candidate; or (4) a symbol or other graphic representation explicitly supporting or opposing the candidate if combined with a word or symbol relating to the nomination or election of the candidate, e.g., the candidate's name with an "x" drawn through it combined with a reference to the date of the election, or a copy of the ballot with only one candidate's name checked. Communications that do not contain these features may be considered "issue advocacy."

The distinction between "express" and "issue" advocacy is significant in part because, under M.G.L. c. 55, business corporations, or organizations that receive funds from business corporations, may not pay for communications supporting or opposing candidates or political parties. In addition, where an expenditure would be permitted under Chapter 55, e.g., it would not be made using corporate funds, the campaign finance law would still require disclosure of the expenditure.

Also, if an organization or group makes an expenditure for a communication containing express advocacy *and also* raises funds for the purpose of paying for the communication, the organization or group becomes a political committee and must organize and register as such with OCPF. Political committees must disclose not only expenditures but also receipts. In contrast, if a communication is "issue advocacy," as defined in this Bulletin, no disclosure is required under the Massachusetts campaign finance law, unless it is coordinated, as discussed below.

Even if a communication is considered "issue advocacy," it may still be regulated *if it is coordinated with a candidate or the candidate's committee.* An expenditure made to distribute, publish or broadcast a coordinated communication relating to a candidate's nomination or election is considered an in-kind contribution subject to the campaign finance law if a candidate or his committee can exercise control over the communication. In addition, such an expenditure is considered an in-kind contribution where there has been substantial discussion or negotiation between the candidate or the candidate's committee and the spender over the communication's (1) contents; (2) timing; (3) location, mode, or intended audience (e.g., choice between newspaper or radio advertisement); or (4) "volume" (e.g., number of copies of printed materials or frequency of media spots).

II. "Express advocacy" as defined by the federal courts

a. *Buckley v. Valeo* and its progeny

In *Buckley v. Valeo*, 424 U.S. 1 (1976) the Supreme Court articulated a distinction between contributions and expenditures, stating that while restrictions on contributions entail only a marginal restriction upon the contributor's ability to engage in free communication, restrictions on expenditures for political communication represent substantial restraints on political speech and are therefore entitled to the closest scrutiny. *Buckley*, 424 U.S. at 19-26.[1] Applying this level of scrutiny, the Court determined that the Federal Election Campaign Act's restriction on expenditures "relative to a clearly identified candidate" in 2 U.S.C. § 608(e)(1) was impermissibly vague. *See Buckley*, 424 U.S. at 39. The vagueness deficiency could, however, be avoided "by reading [the statute] as limited to communications *that include explicit words of advocacy of election or defeat of a candidate.*" (Emphasis added).

In a footnote, the Court provided examples of words of express advocacy, such as "vote for," "elect," "support," "defeat," and "reject." This became known as the "magic words" requirement. In addition, the Court examined the disclosure provisions in 2 U.S.C. § 431, which defined "expenditure" to include the use of money or other assets "for the purpose of ...

[1] The Court upheld a $1,000 limitation on contributions by individuals to candidates, stating that the limitation concerned "precisely on the problem of large campaign contributions – the narrow aspect of political association where the actuality and potential for corruption have been identified – while leaving persons free to engage in independent political expression," i.e., the provision was sustained because the government demonstrated a "sufficiently important interest" and the statute was "closely drawn" to avoid infringement of constitutional rights. *Buckley*, 424 U.S. at 26-29.

influencing" a federal election." *See Buckley*, 424 U.S. at 61. Again, the court determined that to avoid vagueness problems, the statute should be interpreted to reach only funds used for communications that expressly advocate for the election or defeat of a candidate. *Id.*

The "magic words" requirement led to a situation where groups could finance certain communications with money not regulated by the federal campaign finance statute that avoided magic words, but which were, in reality, designed to support or oppose candidates. These communications became known as "issue ads." As a result, the definitions of "express advocacy" and "issue advocacy" have been the subject of much debate and litigation. *See* Trevor Potter and Kirk L. Jowers, *The New Campaign Finance Sourcebook*, Chapter 7, which collects and discusses various circuit court rulings (Brookings Institution, 2005).

Ten years after *Buckley*, the Supreme Court again considered express advocacy and "magic words" in *FEC v. Massachusetts Citizens for Life,* 479 U.S. 238 (1986) *("MCFL").* In *MCFL* the Court, in construing the words of 2 U.S.C. § 441b(a) (the ban on corporate independent expenditures), i.e., "in connection with any election," reiterated that where a campaign finance statute provides a vague definition of expenditures that are regulated by the statute, *Buckley* requires the use of words that explicitly call for the election or defeat of a candidate. In *MCFL*, the Court determined that a Special Edition of a publication that urged voters to "vote 'pro-life'," identified pro-life candidates, and provided their photographs, contained express advocacy. In reaching this conclusion, the Court looked at the words used in the publication to determine its "essential nature." *See MCFL*, 479 U.S. at 249, where the Court stated:

> The Edition cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, it provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than "Vote for Smith" does not change its essential nature. The Edition goes beyond issue discussion to express electoral advocacy.

Federal court decisions since *MCFL* have generally continued to narrowly interpret "express advocacy" to require specific words of electoral advocacy. They have also recognized, however, that the "magic words" listed in *Buckley* are not exclusive. *See, e.g., Maine Right to Life v. FEC*, 98 F.3d 1 (1st Cir. 1996)(*per curiam*) and *Chamber of Commerce of the United States v. Moore*, 288 F. 3d 187 (5th Cir. 2002). For example, in *Moore* the court stated:

> We think it is clear that the examples of express advocacy listed in the *Buckley* footnote are illustrative rather than exhaustive because there are a variety of other words and phrases that convey precisely the same meaning. But express advocacy necessarily requires the use of language that explicitly and by its own terms advocates the election or defeat of a candidate. If the language of the communication contains no such call to action, the communication cannot be express advocacy. Thus, communications that discuss in glowing terms the record and philosophy of specific candidates, like the advertisements at issue here, do not constitute express advocacy under *Buckley* and *MCFL* unless they also contain words

> that exhort viewers to take specific electoral action for or against the candidates.

288 F. 3d at 196-197.

Similarly, in *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C., 1999), the court held that a mailing by the Georgia Christian Coalition before the 1994 Georgia primary advocated the election of Congressman Gingrich because it "was expressly directed at the reader-as-viewer," when the letter stated that "The Primary Elections are here!" and then provided two items "[t]o help you prepare for your trip to the voting booth." *Christian Coalition*, 52 F. Supp. 2d at 58. The court stated:

> while the scorecard leaves ambiguous which candidates the Coalition supports, the following sentence of the letter removed all doubt about the purpose of the Coalition's mailing with respect to one election. 'The only incumbent Congressman who has a Primary election is Congressman Newt Gingrich – a Christian Coalition 100 percenter. Make sure that you save this scorecard for November, however, because all other Congressmen are opposed in the General Election.' The unmistakable meaning of the letter is that because Newt Gingrich has voted as the Coalition would have wanted him to on every vote the Coalition considered significant, the readers should vote for him in the primary election... While marginally less direct than saying 'vote for Newt Gingrich,' the letter in effect is explicit that the reader should take with him to the voting booth the knowledge that Speaker Gingrich was a 'Christian Coalition 100 percenter' and therefore the reader should vote for him.

Christian Coalition, 52 F. Supp. 2d at 65.

The *Christian Coalition* case illustrates the application of the "express advocacy" standard synthesized from earlier federal court opinions (at pages 61-62 of the opinion) to a communication that supported or opposed a candidate, contained words relating to an election, and called for some action relating to the election. In these circumstances, the court indicated that, given the words used in a letter distributed by the Coalition and the timing of the communication, the letter exhorted the reader to take electoral action to support the election or defeat of a clearly identified candidate, and therefore it should be considered express advocacy.

b. <u>BCRA and electioneering communications</u>

Congress enacted the Bipartisan Campaign Reform Act (BCRA) in 2002, in part to address the perception that expenditures intended to influence candidate elections were being disguised as "issue advocacy," i.e., communications that support or oppose a candidate but avoid words calling for electoral action, to allow the funding of last minute election advertising that could be hidden from campaign finance disclosure requirements. BCRA amended the federal campaign finance law (FECA) to close this perceived loophole by creating a new category of expenditures called

"electioneering communications" that are regulated by federal limits and disclosure provisions.[2]

Electioneering communications are defined as broadcast, cable, or satellite communications referring to a clearly identified candidate for federal office, airing within sixty days of the candidate's general election or thirty days of the candidate's primary election, and targeting the candidate's electorate. 2 U.S.C. § 434(f). The definition was intended to include "sham issue ads" paid for with prohibited (corporate or labor) funds, i.e., ads that clearly are intended to influence an election but avoid the use of *Buckley*'s magic words, and therefore escape regulation. 2 U.S.C. § 441b. *See* Potter and Jowers, at 56.

The Supreme Court upheld the electioneering communications provision against constitutional challenge in *McConnell v. FEC*, 540 U.S. 93 (2003).[3] The Court indicated that, unlike the language that had been at issue in *Buckley*, the electioneering communications law was not overly broad or vague. The Court stated that "[I]n narrowly reading the FECA provisions in *Buckley* to avoid problems of vagueness and over breadth, we nowhere suggested that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line." 540 U.S. at 192. In supporting the governmental interest justifying the electioneering communications provision, the Court observed that the statute survives constitutional scrutiny in part because "*Buckley*'s magic words requirement is functionally meaningless." 540 U.S. at 689.

McConnell related to an assessment by the Court of BCRA's recently enacted electioneering communications provision, however, which finds no counterpart in the Massachusetts campaign finance law. The discussion that follows, in Part III, considers the extent to which the definition of "express advocacy" supplied by federal courts can be adopted in Massachusetts.

III. Application of the "express advocacy" definition within the context of the Massachusetts campaign finance law

The Massachusetts campaign finance law contains, in several places, language similar to the language in the 1975 federal law that the Supreme Court found vague and overbroad in *Buckley* and therefore subject to constitutional challenge.

For example, Section 1 of Chapter 55 defines "expenditure" to include money or other things of value spent "*for the purpose of influencing the nomination or election*" of a candidate. Financial activities that meet the definition of "expenditure" in Section 1 are subject to the limits and disclosure provisions of the statute. In addition, in accordance with Section 1, a group or organization that raises funds and makes expenditures to support or oppose a candidate is subject to the disclosure and other requirements that apply to political committees.

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[2] In general, federal rules require that electioneering communications relating to federal candidates be financed using funds from sources permissible under the federal campaign finance law (e.g., such communications may not be financed by corporations or unions). Once payments exceed $10,000, the disbursements and the sources of the funds used must be disclosed within 24 hours. *See* 11 CFR 100.29 and 11 CFR 104.20, and the Federal Election Commission brochure on electioneering communications (http://www.fec.gov/pages/brochures/electioneering.shtml).

[3] However, on January 23, 2006, the Supreme Court, in *Wisconsin Right to Life v. FEC* (04-1581), remanded a challenge to the application of the electioneering communication provision to the District Court, stating, in a short *per curiam* decision, that in upholding the electioneering communication provision "against facial challenge" in *McConnell*, the Court "did not purport to resolve future as-applied challenges." *Wisconsin Right to Life* demonstrates that this is a developing area of the law and that further guidance will be needed in the future.

In addition, where a communication contains express advocacy, funds derived from business corporations may not be used to finance the communication. *See* Section 8, which states that business corporations may not "directly or indirectly give, pay, expend or contribute, or promise to give, pay, expend or contribute, any money or other valuable thing for the purpose of aiding, promoting or preventing the nomination or election of any person to public office, or aiding or promoting or antagonizing the interest of any political party." A business corporation (or an organization that receives corporate funds into its general treasury) may, however, pay for a non-coordinated communication that contains only issue advocacy without being regulated by the Massachusetts campaign finance law. Finally, if an organization or group makes expenditures *and raises funds* for the purpose of paying for a communication that contains express advocacy, the organization or group would be required to register as a political committee and disclosure would be required of the organization's financial activity. *See* M.G.L. c. 55, § 1 and IB-88-01.

Because the language in Sections 1 and 8 is similar to the language described as vague and overbroad in *Buckley*, the "express advocacy" qualification must be read into both sections. The Massachusetts campaign finance law does not provide any guidance, however, regarding the definition of that term, but we may appropriately refer to the meaning supplied by federal court decisions interpreting similar statutes. *See, e.g., Cyran v. Ware*, 413 Mass. 452, 470 (1992).

Although communications that would be defined as "electioneering communications" in the context of federal law are becoming increasingly evident in Massachusetts elections, the Massachusetts legislature, as of the date of this bulletin, has not adopted an electioneering communications provision.[4] Therefore, in comparison to federal law, Massachusetts law has a vague definition of expenditures, including expenditures that might, in the federal context, be subject to regulation as electioneering communications. This means that there is a much greater degree of ambiguity regarding whether such communications, in connection with Massachusetts elections, involve the making of expenditures within the scope of the Massachusetts campaign finance law.

After *Buckley* was decided, the Massachusetts campaign finance law was amended to include a provision, M.G.L. c. 55, § 18A, which regulates independent expenditures.[5] The legislature, tracking language in *Buckley*, drafted Section 18A to regulate express advocacy made independently of a candidate or the candidate's committee. Since there is no definition in Chapter 55, however, regarding the meaning of "express advocacy," we must look to *Buckley*, *MCFL*, and other federal decisions construing the term for guidance.

Based on the analysis in *Buckley*, *MCFL* and other federal court opinions, for a communication to contain "express advocacy" and be regulated as an expenditure, it must contain

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[4] Other states (e.g., California, Connecticut, Florida, Illinois, North Carolina, Ohio, Vermont and Washington) have, however, enacted such statutes.

[5] Section 18A requires the filing of a report disclosing independent expenditures made by any "individual, group or association not defined as a political committee" that "expressly advocate" the election or defeat of a clearly identified candidate or candidates within seven days of any such expenditure exceeding $100 during a calendar year. The statute defines an "independent expenditure" as an expenditure "made without cooperation or consultation with any candidate, or a nonelected political committee organized on behalf of a candidate, or any agent of a candidate and which is not made in concert with, or at the request or suggestion of, any candidate, or any nonelected political committee organized on behalf of a candidate or agent of such candidate." Business corporations may not make independent expenditures. *See* M.G.L. c. 55, § 8.

one of the following: (1) explicit words that urge the nomination, election or defeat of the candidate, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Senate," "vote against," "defeat," or "reject" or synonymous words, such as "unseat," (2) words that urge other electoral action, such as words asking viewers or readers to campaign for or contribute to, the candidate, (3) words, symbols or graphic representations that relate to the candidate's nomination or election (e.g., "vote," "election," or "candidate") if in the context of the entire communication, the words (as in the *Christian Coalition* case) exhort the reader/viewer/listener to take action to support the nomination, election or defeat of the candidate, or (4) a symbol or other graphic representation explicitly supporting or opposing the candidate if combined with a word or symbol relating to the nomination or election of the candidate, e.g., the candidate's name with an "x" drawn through it combined with a reference to the date of the election, or a copy of the ballot with only one candidate's name checked.

Where an organization or individual makes an expenditure containing express advocacy in coordination or consultation with a candidate or the candidate's committee, the organization or individual has made an in-kind contribution to the candidate. In-kind contributions are subject to the limits and disclosure requirements of the campaign finance law. In addition, as discussed in Part IV, coordinated communications that do not contain express advocacy may also, in certain instances, be subject to the campaign finance law.

IV. Coordination of communications that do not contain express advocacy

In striking down limits on independent expenditures, the Court, in *Buckley,* seemed to recognize that money spent on communications that are "coordinated" with a candidate or his campaign or agents may be considered an in-kind contribution, even in the absence of express advocacy. Specifically, the Court compared the federal statutory limit on independent expenditures in Section 608(e)(1) with the separate limit, in Section 608(c)(2)(B), on expenditures "on behalf of" a candidate. The Court stated that the limit on independent expenditures, which it found unconstitutional under the First Amendment, applied *only* to independent expenditures for express advocacy, but in contrast, Section 608(c)(2)(B), applied to "all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate as contributions subject to the limitations set forth in § 608(b)."[6] *See Buckley*, 424 U.S. at 47 (fn. 53). Therefore, *Buckley* reflects an understanding that expenditures that are so "coordinated" with a campaign that they may not be considered independent expenditures may be treated as in-kind contributions to a candidate.[7] The Court did not, however, distinguish coordinated express advocacy from coordinated issue advocacy or define the extent of coordination that would be sufficient to cause an expenditure to be considered a contribution.

In *Clifton v. Federal Election Commission*, 114 F.3d 1309 (1997), however, the First Circuit Court of Appeals considered the extent to which federal regulations governing coordination are permissible. In *Clifton*, the Court assessed the constitutionality of the FEC's regulations[8] restricting corporate contacts with candidates or candidate agents with respect to voter guides and voter

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[6] Section 608(b) contained the limits on contributions from individuals and committees to candidates. *See Buckley*, 424 U.S. at 13 (fn. 12).

[7] Tracking the language in *Buckley*, federal law currently treats coordinated expenditures as contributions. *See* 2 U.S.C. § 441 a(a)(7)(B)(i), which states that "expenditures made by any person in cooperation, consultation, concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate."

[8] 11 C.F.R. § 114.4(c)(4) and (5).

records, and determined that the regulations were invalid, in part because they banned *all* oral communication between corporations involved in publishing voter guides and candidates. The court stated that to be subject to regulation, there must be "some level of collaboration beyond a mere inquiry as to the position taken by a candidate on an issue." *Id.* What level of "coordination" might be sufficient to find an in-kind contribution was not resolved, however, in *Clifton.*

The question of whether coordinated issue advocacy may be regulated was more squarely addressed in *Christian Coalition*, in which the District Court for the District of Columbia found that coordinated issue advocacy was subject to campaign finance regulation, but "the standard for coordination must be restrictive, limiting the universe of cases triggering potential enforcement actions to those situations in which coordination is extensive enough to make the potential for corruption through legislative *quid pro quo* palpable without chilling protected contact between candidates and corporations and unions." 52 F. Supp. 2d at 86-91. The court tried to strike a balance between the position of the Coalition that only coordinated express advocacy can be regulated and the position of the FEC that any consultation about the candidate's plans, projects or needs renders subsequent expenditures "coordinated" contributions and therefore in-kind contributions. 52 F. Supp. 2d at 92.

In *Christian Coalition*, the court stated that, based on *Buckley*, "expressive coordinated expenditures" have the status of in-kind contributions. "Expressive" coordinated expenditures are expenditures that relate to a candidate's nomination or election that, unlike expenditures for other non-communicative materials, might be paid for by a supporter of a candidate. 52 F. Supp. 2d at 85 (fn. 45). Because expressive expenditures raise First Amendment concerns, they can be regulated only if sufficiently coordinated with the candidate or his committee.

Applying the analysis used in *Christian Coalition*, whether a coordinated communication can be treated as an in-kind communication depends on consideration of a number of factors, including the timing and content of a communication. If requested or suggested by a candidate or the candidate's committee, a communication that, given its timing or content, relates to an election would be considered an in-kind contribution. Even if the communication is not aired or published at the request or suggestion of a candidate or committee, however, a communication may still be considered an in-kind contribution if it is coordinated with the candidate or the candidate's committee.

In the *Christian Coalition* case, the court fashioned the following framework for determining whether an expressive communication relating to an election is "coordinated," and therefore an in-kind contribution:

> The fact that the candidate has requested or suggested that a spender engage in certain speech indicates that the speech is valuable to the candidate, giving such expenditures sufficient contribution-like qualities to fall within the Act's prohibition on contributions.
>
> In the absence of a request or suggestion from the campaign, an expressive expenditure becomes "coordinated" where the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over, a communication's (1) contents; (2) timing; (3) location, mode, or intended audience (e.g., choice between newspaper or radio advertisement); or (4) "volume" (e.g., number of

> copies of printed materials or frequency of media spots). Substantial discussion or negotiation is such that the candidate and the spender emerge as partners or joint venturers in the expressive expenditure, but the candidate and spender need not be equal partners. (52 F. Supp. 2d at 92).

We find this articulation persuasive and consistent with *Buckley*. Where a communication that relates to a candidate's nomination or election is "coordinated," as that term is defined by the *Christian Coalition* case, this office would consider the coordinated communication to involve the receipt of an in-kind contribution. As such, payments associated with the communication would be subject to the disclosure requirements and limits of the Massachusetts campaign finance law.

Establishing sufficient coordination to trigger regulation requires demonstration of "some to-and-fro" between an organization or individual making an expenditure and a campaign. *See Christian Coalition*, 52 F. Supp. 2d at 93 (stating that the conversations relating to a voter guide must "go well beyond inquiry into negotiation"). For example, coordination of expenditures for "get-out-the-vote telephone exhortations must rise to the level of discussion or negotiation over (1) the contents of the script; (2) when the calls are to be made; (3) the 'location' or audience, including discussion of which databases are to be used; or (4) the number of people to be called." *Id.* A similar analysis would be applied to other types of coordinated communications. Each instance of possible coordination must be assessed, however, on a case-by-case basis, and we strongly encourage individuals or entities that are considering such expenditures to meet first with OCPF to ensure compliance with the campaign finance law.

We encourage candidates, committees and interested individuals or groups to contact OCPF for guidance prior to the publication or broadcast of messages that might be considered to either contain express advocacy or coordinated communications subject to this Bulletin.

Michael J. Sullivan
Director